

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

WENDY DAVIS, DAVID GINS, and TIMOTHY HOLLOWAY, Plaintiffs, v. ELIAZAR CISNEROS, RANDI CEH, STEVE CEH, JOEYLYNN MESAROS, ROBERT MESAROS, and DOLORES PARK, Defendants.	Civil Action No. 1:21-cv-00565-RP Hon. Robert Pitman
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**PLAINTIFFS’ REPLY IN SUPPORT OF PLAINTIFFS MOTION IN LIMINE TO
ADMIT DEPOSITION TESTIMONY**

The Ceh and Mesaros Defendants’ and Dolores Park’s Oppositions to Plaintiffs’ Motion in Limine to Admit Deposition Testimony of Jason Peña Ahuyon [Dkts. 539, 540] disregard the facts and law counseling in favor of presenting Mr. Peña by deposition given his self-imposed, irrevocable unavailability due to his plans to invoke the Fifth Amendment if called to the stand.

First, Plaintiffs submit as an attachment both the page and line designations of the specific seven and a half minutes of Mr. Peña’s deposition sought to be presented (Ex. A), the page and line deposition designations filed pretrial (Ex. B, and Dkt. 424-6), and the full deposition transcript (Ex. C), which permits the Court to probe the propriety of the Fifth Amendment invocation in each instance, as requested by Defendants. The transcripts and the video deposition excerpts Plaintiffs seek to present—as well as the portions belatedly designated by Defendant Park—indicate that Mr. Peña did not make a “blanket refusal to testify,” but answered some questions and considered each question with his attorney present at the deposition. *See United States v. Melchor Moreno*,

536 F.2d 1042, 1049 (5th Cir. 1976), *opinion supplemented on denial of reh'g*, 543 F.2d 1175 (5th Cir. 1976).

Second, as discussed in Plaintiffs' motion, the legal precedent is clear that Mr. Peña is unavailable due to his planned invocation of the Fifth Amendment, and it is too late for any party to seek to compel his testimony overriding his constitutional right. A party may not withdraw an assertion of Fifth Amendment privilege if using it "in a tactical, abusive manner" or the opposing party would "experience undue prejudice as a result." *Davis-Lynch, Inc. v. Moreno*, 667 F.3d 539, 548 (5th Cir. 2012), *as revised* (Jan. 12, 2012). Defendants cite no reason this analysis should not apply equally to third parties closely associated with a party, as Mr. Peña is with Defendant Eliazar Cisneros. Defendants appear concerned that Mr. Pena's Fifth Amendment invocation unduly prejudices them, but did not move to compel his testimony. Plaintiffs are concerned that Mr. Peña will invoke the Fifth Amendment only to Plaintiffs' questioning, but answer Defendants' counsel's questions despite previously depriving Plaintiffs of his truthful answers. Just today, Mr. Peña again confirmed through his attorney that he plans to assert the Fifth Amendment. The simplest way to avoid both parties' fears of undue prejudice and surprise, and to avoid extended fights before the jury, is to present the limited, attached portions of Mr. Peña's deposition testimony. This approach presents further efficiencies because, as stated in Plaintiffs' motion, Dkt. 538 at 5, Mr. Pena recently informed them that he is the sole caretaker for another and would be severely burdened by traveling to the Court from San Antonio for live testimony—one of several factors behind the timing of the instant motion.

Third, the Ceh and Mesaros Defendants' filing is premised on opposing an adverse inference jury instruction based on the Fifth Amendment invocation. But Plaintiffs' submitted proposed jury instructions filed [Dkt. 424-7], which they emailed to the Court prior to the start of

trial do not include a request for an adverse inference instruction notwithstanding their obvious entitlement to one. *See In re Cowin*, 492 B.R. 858, 885 (Bankr. S.D. Tex. 2013), *aff'd*, 538 B.R. 721 (S.D. Tex. 2015), *aff'd In re*, 864 F.3d 344 (5th Cir. 2017) (citations omitted) (“[T]he Fifth Circuit permits an adverse inference to be drawn against a party due to a non-party witness’ assertion of the Fifth Amendment privilege against self-incrimination. This is particularly appropriate where, as here, the witness and the party to the lawsuit are co-conspirators.”). Plaintiffs are willing to forego such an instruction because Mr. Peña’s deposition—at which he answered some questions relating to his activities and communications but invoked the Fifth Amendment relating to the majority of Plaintiffs’ questions relating to the October 30, 2020 conspiracy—represents just one among many efforts by Defendants to thwart Plaintiffs’ factfinding throughout this case. His refusal to answer questions is relevant to the jury to show the evasiveness of a co-conspirator, not to ask for any inference that Mr. Peña or any Defendant did anything incriminating. The lack of adverse inference instruction mitigates the Ceh and Mesaros Defendants’ fears of undue prejudice to their clients.

Fourth, this witness’s role in no way implicates the Court’s ruling on Plaintiffs’ prior motion *in limine* relating to argument about the absence of other parties, which Defendants’ counsel have flouted already in their questioning of Plaintiff Wendy Davis and witness John Polizzi. Nothing about Mr. Peña’s testimony opens the door to questioning regarding why he was not sued, since there remain innumerable reasons why any Defendant is listed in the pleadings. Defendants’ argument to revisit that motion *in limine* ruling should be denied regardless of the manner in which Mr. Peña’s testimony is presented.

Fifth, Defendant Park’s counsel had the opportunity to counter-designate deposition testimony when they received Plaintiffs’ deposition designations on the pretrial disclosure

deadline. Because they have not, they have waived the ability to now counter-designate deposition testimony. But if the Court were to allow Defendant Park's newly designated Peña deposition portions to be played, Plaintiffs request that it should start at 0:57 of the clip linked in Defendant Park's Opposition, because the first 56 seconds are counsel testifying about her confusion about Mr. Peña's Fifth Amendment invocation, which is not appropriate for presentation to the jury. Additionally, Plaintiffs request that the Court sustain their objections to the form of many of opposing counsel's questions in that portion of the deposition, so those objectionable questions and answers should not be played to the jury.

In conclusion, Plaintiffs request that the Court examine the transcript of the deposition testimony Plaintiffs seek to present in lieu of Mr. Peña's live testimony, declare the Fifth Amendment invocations appropriate, declare Mr. Peña unavailable, and permit Plaintiffs to play the short excerpt of his deposition video in their presentation. This course allows Plaintiffs to present the facts elucidated in discovery to the jury in the most efficient, sensible manner and still "allows jurors to gauge the witness's attitude reflected by his motions, facial expressions, demeanor and voice inflections." *Battle ex rel. Battle v. Mem'l Hosp. at Gulfport*, 228 F.3d 544, 554 (5th Cir. 2000). To respond to Defendants' concerns, Plaintiffs are willing to forego an adverse inference instruction to the jury relating to Mr. Peña's Fifth Amendment invocation.

Date: September 16, 2024

Respectfully submitted,

/s/ John Paredes

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CERTIFICATE OF SERVICE

I hereby certify that on September 16, 2024, a true and correct copy of the foregoing has been served on all counsel of record by the Electronic Case File System of the Western District of Texas in compliance with the Federal Rules of Civil Procedure as agreed by the parties.

DATED: September 16, 2024

Respectfully submitted,

/s/ John Paredes

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